WILLS

Law guide – Legacy giving

Contents

Types of gifts

In Wills, you are generally able to make three different types of gift - specific, pecuniary (i.e. related to money) and residuary. These three types of gift are described below:

Specific

A specific bequest is a gift of a particular item, or group of items of property. For example, you may leave a piece of jewellery or all of your jewellery to a friend or relative.

The item or items may or may not be owned by the person making a Will when the Will is made.

Where the gift is of specific property that the testator owns when he or she makes their Will and the testator disposes of that property during his or her lifetime, the gift will fail. This is because only that specific thing can be gifted. This is known as 'ademption' and the gift is said to be 'adeemed'. For example, the gift in the clause *'My yacht to my friend Niamh'* in the Will of a testator who sold the yacht a few months prior to his death for €30,000 is said to have been adeemed. Unlucky Niamh cannot claim the €30,000.

Where the gift is of property that the testator did not own at the time the Will was made, it will not be adeemed. The property that is the subject of the gift will need to be provided out of the testator's general estate; for example, if a testator makes a gift of 4,000 shares in a quoted company, the executors of the estate will need to use money in the estate to purchase such shares, or sell other assets in the estate to raise money for this purpose.

The gift, however, even though it is not adeemed, may fail - for example, if (using the above example) the quoted company has ceased to exist by the time of the testator's death.

See the chapter 'Losing a gift' for more information.

Pecuniary

A pecuniary gift is simply a gift of money.

Residuary

A residuary gift is a gift of what is left of your estate, known as the residuary estate or residue, after payment of debts, expenses and deduction of gifts you have made, if any, of a specific or pecuniary nature as described above, after you die.

Normally, a Will states that all the debts, expenses and any other gifts are to be paid out of the residue before it is distributed.

Residuary estate

For many people this will be the bulk of their estate and there are a variety of options for giving it away, which for a married person or person in a civil partnership include giving just the income of the estate to your spouse or civil partner, and holding the rest to be given to others after your spouse or civil partner passes away.

You do need to think carefully about what your spouse or civil partner will need after you pass away, however, and ensure that they are not left in a difficult financial position. See also below regarding the succession rights of spouses and civil partners.

In many cases, spouses or civil partners will simply leave the whole of the estate to each other. You could also give a proportion of your residuary estate, expressed as a percentage, to specific individuals or organisations such as a charity and then leave the rest to your spouse, civil partner or partner as the case may be.

Succession rights of spouses and civil partners

The provisions of the Succession Act, 1965 offers protection to the surviving spouse or civil partner by giving them, what is called, a 'legal right share' in the estate of the deceased.

Where a testator leaves a spouse or civil partner and no children, the spouse or civil partner has a right to one half of the estate. Where a testator leaves a spouse or civil partner and children, the spouse or civil partner has a right to one third of the estate (section 111 of the Succession Act, 1965).

Claims against estates

You should be aware that if you have left out certain family members and dependants from your Will, there is a possibility that they could make a claim against your estate under a section 117 application. A section 117 application can only be brought if a person dies testate, i.e. died with a valid Will.

See the chapter 'Family and dependants left out of the Will' of this guide for a fuller explanation of a section 117 application.

Gifts to children

If you have given income or capital to a person under the age of 18, then you can give your trustees the option of giving the income or capital to the minor before they reach this age. Generally, such a person would not be able to receive the gift. Specific authorisation in the Will is required. 'Income or capital' does not, however include shares or other assets such as real property where a transfer of title is required.

This authorisation does not give the minor the right to demand the income or capital. Your trustees can still choose whether or not to give the gift to the minor. It may be convenient, however, to give your trustees this flexibility. Otherwise, your trustees would continue to have responsibility until the minor reaches the age of 18, which would increase the costs of administering your estate perhaps unnecessarily or disproportionately; or else the trustees

could give the gift to the minor's parent or guardian (or a person with parental responsibility for the minor) on behalf of the minor, which carries a risk that the income or capital will not be properly applied for the benefit of the minor.

Inheritance tax on gifts

Inheritance tax, also referred to as Capital Acquisitions Tax (CAT), is a tax on inherited gifts. Any tax that may be due is paid by the individual or the organisation receiving the gift, i.e. the beneficiary.

Tax free thresholds

A gift or inheritance from a spouse or civil partner is not liable to inheritance tax. This will only apply to a legal spouse or civil partner and to divorced persons or where a civil partnership is terminated in certain circumstances. A cohabitant, or partner in the general meaning (i.e. not a civil partner), is treated as a stranger for tax purposes.

If you leave a gift to someone other than a spouse or civil partner then the first portion, known as the tax free threshold, is taken free of tax. The amount of the tax free threshold depends on your relationship to the beneficiary and will also depend on whether any other benefits have been received by them previously.

Where you leave a gift to a child or a child of your civil partner, or a minor child of a deceased child or, in certain circumstances, to a foster child or to a parent (in an unrestricted form) then the tax free threshold is the largest; known as the Group A threshold. If the property is left to a parent (where it is a restricted interest), brother or sister, niece or nephew, or grandchild, then Group B threshold applies, and if property is left to anyone else, e.g. a friend, in law, cousin or partner then Group C threshold applies. See this link for the current threshold amounts – Capital acquisitions tax.

If a person has received other gifts or inheritances since 5 December 1991 then they are added together according to certain rules relating to the date on which the gifts were received and from whom they were received. The effect of this may be to reduce or remove the tax free threshold available for that individual.

Exemptions and reliefs

There are various exemptions available which can reduce or eliminated the amount of tax to be paid. These can also change over time. The following are some of the exemptions currently available:

- **Agricultural property:** To qualify for agricultural relief, 80% of the beneficiary's property (after a gift/inheritance) must consist of agricultural assets as defined. The value of the agricultural property he/she receives may then be discounted when making the CAT return provided other conditions are met.
- **Business property:** If business property, which would generally include assets such as a business or shares in a family company, is inherited, then the beneficiary may be entitled to claim business relief so that the value of the business property inherited is reduced when calculating the inheritance tax (if any) subject to other conditions.
- **Favourite nephews or nieces:** If the beneficiary is a nephew or niece who worked full-time in the business/on the farm with you for five years, and you leave the

business/farm to him/her, then he/she may be entitled to the same tax-free threshold as a son or daughter in relation to that property.

- **Dwelling:** If you leave a house or apartment to a beneficiary who has continuously occupied it as his/her main residence for a period of three years immediately before the date of your death and he/she continues to occupy it for a period of six years after the date of your death, then such a beneficiary may be exempt from tax on his/her inheritance of the house provided all the conditions for exemption are complied with.
- **Minor child of deceased child:** If you leave property to a grandchild who is the child of a child of yours who has predeceased you, and that grandchild is under the age of 18, then that grandchild will be entitled to the same tax free threshold as a child.
- **Surviving spouse or civil partner:** If property is left to the spouse or civil partner of a deceased member of your family, that spouse or civil partner will be entitled to the tax free threshold amount that the deceased family member would have been entitled to in relation to that inheritance.

Inheritance tax planning

You may decide that it is advisable to seek professional taxation advice on how best to allocate your estate among your beneficiaries before you finalise this Will.

In seeking such advice you may also wish to consider getting a Section 72 policy which is an inheritance tax planning tool. It allows for an inheritance tax liability to be provided for in a highly tax efficient manner hence easing the burden of transferring wealth from one generation to the next.

Technically a Section 72 policy is a whole of life policy set up to meet the requirements of Section 72 Capital Acquisitions Tax Consolidation Act 2003. Usually the policy is set up under a Section 72 trust making the proceeds of the policy exempt from inheritance tax.

Making a gift to an Irish charity

While you will naturally want to make adequate provision in your Will for your family and friends, you may want to consider making a gift to an Irish charity as well.

Making a gift to a charity is relatively simple. You need to get the name, address and, preferably, the Registered Charity Number of any charities you wish to give to and decide what gift(s) you wish to make. You can make a gift of money, specific items, or include them as a residuary or alternative residuary beneficiary.

Specific wishes regarding use of the gift

In making a gift you may wish to specify that it should be used for a particular purpose, or purposes, by the charity. In doing so, however, your gift becomes conditional and restricted. If the charity is unable to meet the conditions you have specified there could be difficulties in making the gift.

This may not be a problem, however, if your wishes are closely related to what the charity already does.

A more flexible way of stating you wishes would be to use a Letter of wishes. A letter of wishes is not legally binding and therefore it allows you to express your hopes for how the gift will be used but does not bind the charity if there are difficulties in carrying out your precise instructions.

Taxation of gifts received by a charity

A gift is exempt from Inheritance Tax once the Revenue Commissioners are satisfied that it has been or will be applied to purposes which, in accordance with Irish law, are public or charitable.

Charities meeting required criteria can apply for 'charitable tax exemption' status to the Revenue Commissioners. In granting this exemption the Charities Section of the Revenue Commissioners assigns the charitable body a CHY reference number. The full list of bodies granted this exemption is published on the Revenue Commissioners' website at Charities with tax exempt status.

If you decide to make any gifts to charities in your Will, you should also inform the charity, or charities, that you have done so.

Type of charitable gifts

The LawOnline Wills process gives you the option of leaving a gift to a charity. There are three different types of gifts or legacies that are most commonly given through Wills to bodies such as these, as follows:

1. Residuary gift: Your residuary estate, or residue, is what remains of your total estateafter deducting any debts, taxes or expenses that are due and the value of any specific legacies that you have made in your will, e.g. legacies to your closest family members. You could then leave all, or a percentage, of the residue to a charity in the knowledge that you have already taken care of the people closest to you.
2. Pecuniary gift: This is a gift of a specific or fixed amount of money.
3. Specific gift: This is the bequest of a particular item or asset such as property, jewellery, shares etc..

Using a codicil to make a gift to charity

Where you would like to make some relatively simple and straightforward amendments or alterations to your Will, but you do not wish to create a new Will, you should use a codicil to do so.

Thus, if you have already made a Will and now wish to make a gift to a charity you can do so by using a codicil without having to draft an entirely new Will.

LawOnline provides a codicil document process specifically for the purpose of making a gift to a charity – see Codicil making a gift to an Irish charity.

The Charities Regulatory Authority

The Charities Regulatory Authority lists all charities operating in the Republic of Ireland. The register can be accessed at Charities Regulatory Authority and contains the following information about each charity:

- name of the charitable organisation
- principal place of business
- other names, abbreviations, etc.
- the Registered Charity Number
- governing form
- whether it is an educational body
- CHY & registered company numbers (if both applicable)
- country where charity established
- purpose and objects of the charitable organisation
- activities and beneficiaries of charity
- reporting period
- average number of employees in reporting period
- number of individuals volunteering for the charity in reporting period
- gross income in reporting period as supplied by the charity

- total expenditure in reporting period as supplied by the charity
- name of charity trustees/officers/directors
- other locations and premises in Ireland
- whether operating in Northern Ireland and registration number if registered there
- other countries charity is operational in

It is advisable to quote the Registered Charity Number in your Will to ensure that your gift goes to the correct charity. It is also recommended that you check the correct address of the charity's principle location of its operations.

Gifts to Irish amateur sports clubs

Similar to charities, amateur Irish sports clubs can qualify for an exemption from Inheritance Tax as long as the gift is used for a 'public purpose'. The latter term is not defined by the Revenue Commissioners. The club should be a recognised sports club ideally affiliated to a National Governing Body within the Federation of Irish Sports.

Thus you may also wish to consider making a gift in your Will to your local sports club and the same considerations apply as outlined above in respect of charities.

If you have already made a Will and now wish to make a gift to an amateur sports club you can do so by using a codicil without having to draft an entirely new Will. LawOnline provides a codicil document process specifically for the purpose of making a gift to an amateur Irish sports club – see Codicil making a gift to an Irish amateur sports club.

Losing a gift

Where a person leaves a specific gift, for example, to a relative, friend or charity, but it is not properly described and cannot be identified, or the gift is not in existence at the date of death, the relative, friend or charity may well lose the gift.

Uncertainty

A gift may fail for uncertainty if the property cannot be identified from the description in the Will. For example, if the testator (someone who makes a Will) gives the beneficiary 'a ring' and it is subsequently found that there are a number of rings and there is no description as to which ring has been given to the beneficiary. The gift will thus fail if it cannot be identified and will form part of the residue (what is left over) of the estate.

A gift may also fail if the beneficiary is not properly identified. This applies both to individuals and organisations.

Not meeting requirements

Where a gift is subject to a condition, it will not only fail if the beneficiary dies before the testator, but will also fail if the beneficiary dies after the testator but before fulfilling a specific condition. The most common situation that arises is where the testator leaves a gift to a child subject to the child reaching a particular age. If the child does not reach the specified age the gift will fail, unless it is protected by a clause leaving the gift to another person or persons (e.g. grandchildren) in the event that the first intended beneficiary predeceases the testator.

Lapse

If the beneficiary of a gift dies before the testator the gift will lapse. In these circumstances, the general rule is that the gift falls into the residue and does not form part of the beneficiary's own estate. This is referred to as 'the doctrine of lapse'. If the gift is of the residue of the estate, the gift will be distributed under the intestacy rules unless an alternative residuary beneficiary has been named in the Will.

There are exceptions to the doctrine of lapse and the exception that applies most commonly in practice covers gifts to children of the testator (see below).

A gift will not lapse if the beneficiary can be shown to have survived the testator, for however short a period, unless inheritance is expressed as being conditional upon the beneficiary surviving the testator for a certain period of time.

If the deaths of the testator and beneficiary occur close together in time it is important to establish the order in which those deaths take place. If two people die together (for example, in a car accident) and there is no evidence of the order of their deaths, the normal rule is that the younger is deemed to have survived the older.

Gift over clauses to prevent the lapse of a gift

A testator should consider including, what is called, a 'gift over' clause in respect of all bequests in a Will as there is always the risk that a beneficiary may predecease them. A gift over clause essentially provides for a gift to be made to a second beneficiary if a certain event occurs such as the death of the first beneficiary.

In particular relation to gifts to children section 98 of the Succession Act 1965 says:

> *'Where a person, being a child or other issue of the testator to whom any property is given (whether by a devise or bequest or by the exercise by will of any power of appointment, and whether as a gift to that person as an individual or as a member of a class) for any estate or interest not determinable at or before the death of that person, dies in the lifetime of the testator leaving issue, and any such issue of that person is living at the time of the death of the testator, the gift shall not lapse, but shall take effect as if the death of that person had happened immediately after the death of the testator, unless a contrary intention appears from the will'*

This relates to a situation where a testator leaves a gift to a child and that child dies before them leaving a child (the testator's grandchild) surviving at the date of their death. One would expect that the gift would pass to the grandchild but under section 98 this is not the case. The gift will pass instead into the estate of the deceased child and will be distributed in accordance with the terms of his or her Will if there is one or, if not, in accordance with the rules of intestacy.

Therefore, if it the intention is that the grandchildren receive the bequest of a child that may predecease, this needs to be specifically stated in the Will. This is called a 'gift over' clause.

Alternatively, the testator may be quite happy that the gift - a sum of money for example - falls into the residue if the beneficiary dies before them in which event there is no need to include such a clause in the Will.

If the wording in the gift indicates clearly that each beneficiary is to receive a specific share of the gift, if one of the beneficiaries dies the surviving beneficiary will take their share and the other share will either fall into residue, be subject to the intestacy rules if it is a gift of a share of residue or if there is a gift over clause, the substitute beneficiary will take that share.

Alternate residuary beneficiaries.

To ensure as best you can that your residuary estate does not become subject to the rules of intestacy you can also nominate alternative residuary beneficiaries in case some or all of those you name in the Will as residuary beneficiaries die before you.

Divorce or Civil partnership dissolution

If property or any interest in property is left to a spouse or civil partner and the parties divorce or dissolve their marriage or civil partnership after the making of the Will, the property or interest in property will not pass to the former spouse or civil partner unless the Will provides

otherwise. It is therefore important for a testator to consider this issue when preparing their Will.

A gift that is not yours to give

Where the gift is of specific property that the testator owns when he or she makes their Will and the testator disposes of that property during his or her lifetime, the gift will fail. This is because only that specific thing can be gifted. This is known as 'ademption' and the gift is said to be 'adeemed'. For example, the gift in the clause *'My yacht to my friend Niamh.'* in the Will of a testator who sold the yacht a few months prior to his death for €30,000 is said to have been adeemed. Unlucky Niamh cannot claim the €30,000.

Where the gift is of property that the testator did not own at the time the Will was made, it will not be adeemed. The property that is the subject of the gift will need to be provided out of the testator's general estate; for example, if a testator makes a gift of 4,000 shares in a quoted company, the executors of the estate will need to use money in the estate to purchase such shares, or sell other assets in the estate to raise money for this purpose.

The gift, however, even though it is not adeemed, may fail - for example, if (using the above example) the quoted company has ceased to exist by the time of the testator's death.

Problems also arise where the asset is not sold but has changed in nature. This happens most commonly with company shares. The company may have been taken over since the Will was made so that, on death, the testator owns the shares in a different company.

In each individual case it must be decided whether the asset has changed merely in name or form or whether it has changed in substance. Only if there has been a change in substance will the gift be lost. It is therefore extremely important in preparing the Will that a particular asset is clearly described and the testator must be aware of the risks should there be a substantial change in the asset.

Family and dependants left out of the Will

When a person dies a surviving spouse or civil partner, any child of the family and certain cohabitants or other dependants, may apply to the courts in certain circumstances and request reasonable financial provision to be made for them from the estate, where the deceased's Will does not make such reasonable financial provision.

When deciding to make a Will, it is important to consider whether a particular person should be excluded who may ultimately have a claim against the estate. Depending on the circumstances it may be advisable to leave a gift to the particular person concerned. It is good practice for the testator (someone who makes a Will) to leave a Letter of wishes with the Will explaining why a particular person has been ignored or left a relatively small gift. This will not avoid a claim but it may, in some cases, assist the court in arriving at a decision as to whether a beneficiary is entitled to any provision.

A right to claim

An application must be brought within six months of the date of issue of the grant of representation to the deceased's estate. The court does, however, have discretion to extend this time limit.

Who can claim?

Claims can be made by:

1. a surviving spouse or civil partner
2. a former spouse or civil partner who has not remarried or entered into a new civil partnership
3. a child of the deceased, any person (other than a child of the deceased) whom the deceased treated as a child of the family in relation to a marriage or civil partnership to which the deceased was a party
4. any person who lived in the same household as the deceased in an intimate and committed relationship, and who is not related to the deceased within the prohibited degrees of relationship or married to or a civil partner of the deceased, for the two years up to death, if they have a child together, or the five years otherwise. Such individuals are known as ‘qualified cohabitants’.

Grounds for a claim

The only ground for a claim is that reasonable financial provision has not been made. The courts determine whether the testator failed in their moral duty to make proper provision for a person.

In respect of all categories, there are certain common guidelines that must be borne in mind when considering an application to the court for provision. These include, among others, the financial resources and needs of the applicant, the deceased's moral obligations towards the

applicant or beneficiary, the size and nature of the estate, the physical or mental disability of any applicant or beneficiary, and anything else which may be relevant.

The court should take into account all the facts as at the date of the hearing and should have regard to the financial resources and needs of the applicant, their earning capacity, and financial obligations and responsibilities.

Surviving spouse or civil partner

In order to qualify as a surviving spouse, the person must be married to the deceased at the date of death. If the surviving spouse was married at the date of death but has since remarried when the application is actually heard, this is a factor that will be taken into account by the court in deciding whether an order should be made. Equivalent provisions apply in relation to civil partners.

The court will consider what financial provision would be reasonable in the circumstances for the spouse or civil partner in determining whether the deceased's Will has actually made reasonable financial provision for the spouse or civil partner.

In addition to the common guidelines, the court should also take into account certain special guidelines. They include the age of the applicant and duration of the marriage or civil partnership, and the contribution made by the applicant to the welfare of the family such as looking after the home. The court should also consider what the applicant might have received if the marriage or civil partnership had ended in divorce or dissolution rather than being terminated by death.

Former spouse or civil partner

This category is limited to a former spouse or civil partner who has not remarried or entered into a new civil partnership at any time prior to the hearing.

It is important to examine the divorce (dissolution in the case of a civil partnership) documentation, as very often a clause is included in a settlement agreement or consent order preventing a party to the marriage or civil partnership from bringing a claim in the event of a death. If such an order was made, the court cannot consider an application by the former spouse or civil partner.

The court should consider all the circumstances to establish whether reasonable financial provision should have been made for the applicant. What constitutes reasonable maintenance is difficult to define. It is more than mere subsistence but is unlikely to extend to a level covering everything that a person might want.

In addition to the common guidelines a court will also take into account special guidelines such as the age of the applicant, duration of the former marriage or civil partnership, and the contribution made by the applicant to the welfare of the family including looking after the home.

Where the court accepts that provision should have been made for the former spouse or civil partner, it will often order periodic payments from the deceased's estate. The periodic payments will cease if the applicant remarries or enters into a new civil partnership.

Application by qualified cohabitant

A qualified cohabitant is defined by Section 172 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 as being an adult who lives in the same household in an intimate and committed relationship with another adult and who, immediately before the time that relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period of 2 years or more, in the case where they are the parents of one or more dependent children, and of 5 years or more, in any other case. An application may be made by a qualified cohabitant of the deceased irrespective of whether the partner was being maintained by the deceased.

The above applies to same-sex couples as well as heterosexual couples.

Although the qualified cohabitant may bring a claim without having to prove maintenance by the deceased, reasonable financial provision may only be awarded to the extent that it is required for the partner's maintenance. The court should consider all the circumstances in respect of each application and can make awards such as periodic payments, a lump sum payment or transfer of property.

It should be noted that an inheritance received by a qualifying cohabitant under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 is exempt from Inheritance Tax.

Application by a child of the deceased

Section 117 of the Succession Act 1965 states as follows:

> *Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.*

A child includes illegitimate, adopted and unborn children. There is no age restriction and, in itself, marriage will not affect a claim. Once again reasonable financial provision may only be awarded to the extent required for the child's maintenance. An adult child who is quite capable of working and looking after himself or herself is unlikely to succeed in a claim.

The common guidelines apply and in addition the court will consider the manner in which the applicant was being, or might expect to be, educated or trained.

Application by a person treated as a child of the family

A stepchild can make an application under this category. The applicant must show that the deceased took on a parental role, which is more than showing affection and kindness.

Adults may apply under this category even if they are over the age of 18 when the deceased married their parent. As with the previous category, the test is whether reasonable financial provision for their maintenance has been made. The court is unlikely to entertain such an application where the person is able bodied and capable of looking after themselves.

Section 117 (2) of the Succession Act 1965 states that the court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

A time limit of 12 months applies to such applications, from the first taking out of representation of a deceased's estate. The costs of Section 117 applications can often come out of the deceased's estate and therefore can reduce the value of gifts going to other beneficiaries, benefiting under the deceased's estate.

Once again, the court considers the common guidelines as well as certain special guidelines. They include:

- the manner in which the applicant was being, or might expect to be, educated or trained
- the extent of responsibility assumed by the deceased towards the applicant
- whether the deceased knew the child was not their own
- whether anyone else is legally responsible for the maintenance of the applicant and, if so,
- whether the natural parent pays maintenance under an existing court order

Children of a deceased civil partner

The legal right share given to civil partners, unlike that given to spouses, is not an absolute one. A child of a deceased civil partner can seek an order for provision from the estate where his or her deceased parent has failed in his or her moral duty to the child and this claim could reduce the legal right share of the surviving partner:

> *An order under this section shall not affect the legal right of a surviving civil partner unless the court after consideration of all the circumstances including the testator's financial circumstances and his or her obligations to the surviving civil partner is of the opinion that it would be unjust not to make the order.*

Succession rights of spouses and civil partners

Legal right share

The provisions of the Succession Act, 1965 offers protection to the surviving spouse by giving them, what is called, a 'legal right share' in the estate of the deceased. Where a testator leaves a spouse and no children, the spouse has a right to one half of the estate. Where a testator leaves a spouse and children, the spouse has a right to one third of the estate (section 111 of the Succession Act, 1965).

A spouse's "legal right" has priority over any other bequests, although it may be renounced in writing at any time while the testator is still alive. A spouse who has deserted or committed a serious offence against the testator or his/her children loses the right to a share in the estate. The legal right may be extinguished by agreement or following a judicial separation and will disappear after a divorce.

A husband and wife's mutual rights to succeed to each other's estates may also be extinguished by the Court at any time on or after a decree of judicial separation, under the Family Law Act 1995. (Succession rights are automatically extinguished after a divorce, as the couple are no longer man and wife. Where a marriage is void, the partners are not spouses and these provisions also do not apply.)

The family home

If there is a family home which forms part of the estate, the surviving spouse or civil partner can retain the familyl home in full or partial satisfaction of their interest in the estate. This is known as the right of appropriation which may be exercised by a spouse or civil partner under section 56 of the Succession Act 1965.

Section 56 of the Succession Act 1965 states that:

> *where the estate of a deceased person includes a dwelling in which, at the time of the deceased's death, the surviving spouse was ordinarily resident, the surviving spouse may, subject to subsection (5), require the personal representatives in writing to appropriate the dwelling under section 55 in or towards satisfaction of any share of the surviving spouse.*

Thus a surviving spouse or civil partner who, at the time of the deceased's death, was resident in the family home can take this property, together with any chattels as part of any share to which they are entitled to. The executors must notify the surviving spouse of this right. A section 56 application cannot be exercised after six months from the receipt of such a notification or one year from the first taking out of representation of the deceased's estate, whichever is the later.

In view of the right to retain the family home, the PRs should not sell or otherwise dispose of the property until they inform the surviving spouse or civil partner of their right to appropriation under section 56 of the Succession Act 1965.

Spouse or civil partner's right of election

Section 115 of the Succession Act 1965 states that where is a gift to a spouse or civil partner, the spouse or civil partner may elect to take either that gift or the share to which he or she is entitled as a legal right.

A spouse, in electing to take his or her share as a legal right, can take any bequest to him or her which is less in value than their full share in partial satisfaction of their right.

Where a person dies partly testate and partly intestate, a spouse or civil partner may elect to take either:

(a) his or her share as a legal right, or

(b) his or her share of two-thirds if there are children and all if there are none under the intestacy rules, together with any gift to him or her under the Will of the deceased.

How to alter your Will

Overview

A codicil gives you an opportunity to make relatively small alterations to your Will without the need to draft a completely new Will. It should be remembered that a codicil is an independent document in itself. If you subsequently cancel your Will, you might not cancel your codicil automatically.

If you wish to cancel changes made by way of a codicil, you must make this clear either by making a new Will or else making a new codicil which to that effect.

Codicils

A codicil is similar to a Will but generally it is supplemental to a Will that has been previously made. The process of making a codicil is subject to the same formal requirements as for a Will.

For all practical purposes, codicils are used to make straightforward additions or amendments to an existing Will. These include the change of an executor, a change to a specific gift or the addition of a beneficiary and any other minor alterations that may be required. Where it is necessary to make more fundamental changes to the Will, it is advisable to consider making a new Will.

A codicil can exist independently of any Will. If the testator cancels a Will, but does not cancel a codicil that was made subsequent to the Will, it may result in there being inconsistencies that should be avoided. For this reason, the revocation clause in a subsequent Will should express a clear intention to revoke all former Wills and testamentary dispositions (i.e. documents that are Wills or alter existing Wills (e.g. codicils) or are part of existing Wills).

Types of codicils

There are many different situations which can arise where you might want to make alterations to your Will using a codicil. Some of these are described below:

- to appoint a substitute executor on death of executor
- to make an additional gift to an existing or new beneficiary
- when an executor no longer wishes to act as an executor
- to cancel a gift made in your Will to a beneficiary

